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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 552.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR TRUSTEES OF THE CONSOLIDATION COAL COMPANY, DEBTOR, APPELLEES.

HENRY C. HALL,
ALEX. M. BULL,
Counsel for Trustees of The Consolidation Coal Company, Debtor, Appellees.

716 Jackson Place, N. W.,
Washington, D. C.,
April 24, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR TRUSTEES OF THE CONSOLIDATION COAL COMPANY, DEBTOR, APPELLEES.[1]

STATEMENT.

The opinion of the court below (R. 128, *et seq.*) is reported in 7 F. Supp. 33.

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[1] When these cases were tried in the lower court The Consolidation Coal Company was in the hands of receivers and they were allowed to intervene as defendants (R. 123, 184). The following order in this case was on the list filed with the Clerk of this Court on December 17, 1934:

"It is ordered that Robert P. [C.] Hill and L. S. Zimmerman, Trustees of the Consolidation Coal Company, be and they are hereby substituted as parties appellees in the place and stead of Robert P. [C.] Hill and Howell Fisher, domiciliary receivers; Robert C. Hill and William H. Koch, ancillary receivers; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid."

We understand that the briefs for defendants and the intervening defendant carriers, appellees here, will adequately state all issues and pertinent facts. For brevity and convenience our statement thereof will be confined to such short explanations as will aid the Court in following the argument which we present.

A brief description of the location of the various points and districts involved may be helpful.

The consuming territory is northeastern Ohio.[2] The principal origin districts are Freeport, in Pennsylvania, northeast of the City of Pittsburgh; Pittsburgh, to the south of the City of Pittsburgh and extending over into West Virginia as far as the Ohio River; Moundsville, in the Panhandle area of West Virginia along the Ohio River, immediately south of the portion of the Pittsburgh district in West Virginia; Connellsville, in Pennsylvania extending south from the Pittsburgh district to the West Virginia State line; and Fairmont, in northern West Virginia immediately south of the Pennsylvania-West Virginia State line and the Connellsville district.

The location of other districts may be noted from Exhibit F-3, R. 1386A. River mines[3] are located on the Monongahela River in the Connellsville and Pittsburgh districts in Pennsylvania, and on the Ohio River in the Moundsville district and that part of the Pittsburgh district in West Virginia. Ohio No. 8 district is in Ohio, immediately across the river from the Panhandle area of West Virginia. There are no river mines in that district. There are no river

[2] As used herein northeastern Ohio is that part of Ohio east of a north and south line through Sandusky and Galion and north of an east-west line through Columbus.

[3] The term "ex-river coal" as used herein means coal moved by river barges or boats to rail transfer points, and there loaded into railroad cars for movement to final destination; the term "ex-river rates" means rail rates applying on ex-river coal from the rail transfer point to final destination; the term "river mines" means mines so located that coal from their tipples can be loaded into barges or boats without previous rail haul; the term "rail mines" means mines so located that coal from their tipples can be loaded directly into railroad cars. Some mines are both "river mines" and "rail mines" within these definitions.

mines in the Freeport district. These appellees have no river mines in the Fairmont district. The ports through which the ex-river coal is handled are Colona and Conway, Pa., a short distance down the Ohio River from the City of Pittsburgh, and the lower ports,[4] which are 50 to 70 miles further down the Ohio River than are Colona and Conway. The river ports may be located from Exhibit F-1, R. 1384A.

The shortest haul by water for ex-river coal before it reaches the rail port is one mile from mines in the Panhandle area of West Virginia to Martin's Ferry, Ohio. The longest possible water haul is about 165 miles from mines on the Monongahela River to Martin's Ferry. But the record shows no movement from mines on the Monongahela River to that or other lower ports, and the longest movement seems to be about 100 miles from the Nemacolin mine in the Connellsville district to Colona (R. 47, 1112).

In *Construction of Branches by Pittsburgh, L. & W. R. Co.*, 150 I. C. C. 43, and 150 I. C. C. 619, the application of that carrier, hereinafter called the Lisbon, for authority to construct extensions of its line to Smith's Ferry, Pa., on the Ohio River, and to Youngstown, Ohio, so as to form a through route from the Ohio River to Youngstown, was denied on the representation of the Pennsylvania Railroad Company and the Pittsburgh & Lake Erie Railroad Company that they would provide adequate facilities, service, and reasonable rates in connection with the transportation of ex-river coal, and with the understanding that the rates would be published immediately for the Commission's investigation and consideration.

Accordingly the Pennsylvania and the P. & L. E. filed schedules to become effective May 15, 1929, naming proportional rail rates of $1.02 per net ton on ex-river coal to Youngstown, and a few destinations usually grouped therewith, from Conway and Colona, Pa., respectively.

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[4] A number of ports between and including Steubenville, Ohio, on the north, and Bridgeport, Ohio, on the south, served by the B. & O., P. R. R., and Wheeling and Lake Erie.

Operation of the schedules was suspended in I. & S. No. 3282, *Bituminous Coal to Youngstown*, 163 I. C. C. 3, hereinafter called the *First Ex-River Case* (R. 72, *et seq.*).

In that proceeding, decided March 27, 1930, Division 5 found that a reasonable maximum rail rate on this ex-river coal would be 77 cents from Colona and Conway to Youngstown and points grouped therewith, including Warren, Ohio. It further found that the suspended schedules had not been justified, but without prejudice to the filing of new schedules in conformity with the views expressed in the report.

At that time there were no facilities at Colona and Conway for handling ex-river coal and there was no movement (R. 191, 210, 216).

Later, by schedules filed to become effective June 22, 1931, the Wheeling[5] proposed to establish rail rates of 95 cents per net ton to Canton and Massillon, Ohio, and $1.10 to Cleveland, Lorain, and South Lorain, Ohio, from Martin's Ferry, Mingo Junction, and 9 other points in Ohio, located on its river division, which extends south along the Ohio River from Steubenville, Ohio, to a point opposite Wheeling, W. Va. The operation of those schedules was suspended in I. & S. No. 3619, the *Second Ex-River Case*[6] (R. 85, *et seq.*)

The Wheeling urged that the rates it proposed would be reasonable minimum rates. *Second Ex-River Case* (R. 88).

Division 4 found (May, 1932) that the proposed schedules had not been justified and required them to be cancelled without prejudice to the filing of new schedules naming rates of $1.02 per net ton to Canton and Massillon and $1.27 to Cleveland, Lorain, and South Lorain from ports on the Wheeling's river division (R. 98). These ports are from 50 to 70 miles farther down the river than are Colona

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[5] The Wheeling and Lake Erie Railway Company and its subsidiary, the Lorain & West Virginia Railway Company, are hereinafter collectively called the Wheeling.

[6] *Ex-Ohio-River Coal to Ohio Points*, 185 I. C. C. 211, decided May 31, 1933, by Division 4, will be so referred to hereinafter.

and Conway (R. 1089). The rates so approved by Division 4 were based on the 77-cent rate from Colona and Conway to Youngstown, approved by Division 5 in the *First Ex-River Case*, plus the existing differentials of 25 cents and 50 cents, respectively, by which the all-rail rates from Pittsburgh to those destinations exceeded the all-rail rate from Pittsburgh to Youngstown. *Second Ex-River Case* (R. 96-97).

At that time the Wheeling had no facilities for handling ex-river coal, although there were private facilities at some of its ports which could be used to transfer coal from barges to cars. There was no movement (R. 333, 336).

The rates so found lawful in the two ex-river cases were established July 16, 1932, as were ex-river rates in the same amounts to most of the destinations[1] involved in those two cases (R. 1476, 1484-1485), over the Pennsylvania Railroad from some of its river ports in the Mingo-Steubenville district, and over the Baltimore and Ohio from Martin's Ferry, Ohio, all being in the vicinity of the Wheeling's river division.

Thereupon, in accordance with certain orders of the Public Utilities Commission of Ohio, rates to northeastern Ohio from Ohio No. 8 and other producing districts in Ohio were reduced effective on August 1, 1932, and later dates. These reductions were followed by reductions from mines in the Pittsburgh district in Pennsylvania on the Pittsburgh & West Virginia Railway, but not from other mines in that district, and not from mines in other districts in Pennsylvania and West Virginia. These changes increased the spreads between the rates from mines in the Ohio districts, on the one hand, and those from mines in the Pennsylvania districts (other than on the P. & W. Va.) and in the West Virginia districts, on the other.

Complaints followed and a thirteenth-section investigation by the Commission, which were heard together and decided in one report on May 2, 1933, *Intrastate Rates on*

[1] Other ports and/or destinations were added by later tariffs (R. 1484).

Bituminous Coal within Ohio, 192 I. C. C. 413, hereinafter called the *Ohio Coal Cases* (R. 1545, *et seq.*). The ex-river rates were not in issue in those proceedings (R. 1570). The Commission there found, among other things (R. 1591), that the interstate rates from the Pittsburgh, Freeport, Connellsville, and Fairmont districts (with certain exceptions as to Fairmont, reserved for further consideration) to destinations in northeastern Ohio were reasonable; and that the intrastate rates in issue from eastern Ohio districts to destinations in northeastern Ohio—

> "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio."

It required the State rates to be raised to a basis no lower than that in effect immediately prior to August 1, 1932.

Bills to enjoin the order in the *Ohio Coal Cases* were filed in the District Court for the Southern District of Ohio, Eastern Division, which dismissed the bills, and this Court affirmed the action of the lower court, *Ohio* v. *United States*, 292 U. S. 498, May 28, 1934. The rates prescribed by the Commission were made effective on February 16, 1934 (R. 154).

Just prior to the hearing of the *Ohio Coal Cases* before the Commission (R. 1493) the principal carriers, other than the Wheeling, filed a petition (R. 1488) and then, while the hearing was in progress (R. 1193, 1366), filed another, asking the Commission to reopen the two ex-river cases (R. 1187, 1360). The first petition was denied (R. 1510). The second was granted, and by order of May 8, 1933 (R. 1514), entered after its decision in the *Ohio Coal Cases*, the Commission reopened both cases for further hearing, which was had commencing June 26, 1933, and, as a result of such further hearing the Commission, on December 5, 1933,

entered the order now under review, *Coal, Bituminous, Ex-River, from Colona and Conway, Pa.*, 197 I. C. C. 617 (R. 23, 1540). This will be called the *Third Ex-River Case.*

In that report the Commission found (R. 45-46):

"Findings.

"We affirm the former findings in these proceedings that the schedules there proposed are not justified. We, however, modify the additional findings in the former reports and find that the ex-river rates assailed are unreasonably low to the extent that they are or may be less than the following: From Colona and Conway to Youngstown 90 cents, and from the Wheeling's River division transfer points to Canton and Massillon $1.20, and to Cleveland, Lorain, and South Lorain $1.45; to apply on ex-river coal originating at mines on the Monongahela, Allegheny, and Ohio Rivers, transferred from river barges or boats to railroad cars, when for track delivery at the destinations named above; said rates to be subject to a minimum of 50,000 pounds; and that the findings herein are without prejudice to the establishment of an ex-river rate of 90 cents from Colona and Conway to Youngstown, and ex-river rates from the points named herein on the Wheeling's River division of $1.20 to Canton and Massillon and $1.45 to Cleveland, Lorain, and South Lorain, and said rates to be subject to a minimum of 50,000 pounds.

"We further find that the maintenance of ex-river rates from Colona and Conway, and from transfer points on the Wheeling's River division to the destinations under consideration or [on] any basis less than hereinafter indicated will constitute undue prejudice against operators of inland coal mines located in the Freeport, Pittsburgh, Connellsville, and Fairmont districts, and undue preference of operators of mines located on the Monongahela, Allegheny, and Ohio Rivers transferring coal from barges to respondents' rails at Conway, Colona, and at transfer points on the Wheeling's River division to the extent that:

"The ex-river rates from Colona and Conway to Youngstown may be less than those based on 44 cents under the contemporaneous all-rail rates maintained by respondents on like traffic from the Pittsburgh district to the same destination, and 44 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district, from Freeport, Connellsville, and Fairmont districts to the same destination; and the ex-river rates from the Wheeling's River division transfer points to Canton, Massillon, Cleveland, Lorain, and South Lorain may be less than those based on 39 cents under the contemporaneous all-rail rates maintained from the Pittsburgh district to the same destinations, and 39 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville, and Fairmont districts to the same destinations.

"An appropriate order will be entered."

The order was entered (R. 1540-1542).

Two bills were then filed in the court below which, taken together, sought injunctions against the entire order of the Commission (R. 128-129). Both bills were dismissed (R. 148).

The Consolidation* contended before the Commission that the spreads between the all-rail and ex-river rates were greater than were justified by the circumstances and conditions surrounding the movement, caused it to lose business to mines able to ship by river, and resulted in rates unduly prejudicial to it and unduly preferential of competitors able to use the ex-river rates. It further contended that the continuance of the ex-river rates effective July 16, 1932, would disrupt the all-rail adjustment by forcing down the all-rail rates from the districts in which the river mines are located, thus increasing the disadvantage in the all-rail adjustment then existing against the Fairmont district in

* For convenience these appellees and their predecessors (see note 1) are hereinafter so designated.

which The Consolidation's mines are located. No all-rail rates on coal from mine to market were in issue in those proceedings.

The Consolidation has no mines in the Fairmont district equipped with river tipples (R. 154, 1030). Its primary concern in these proceedings was and is with the relationship of these ex-river rates to the all-rail rates from mine of origin on which its coal must move. It can not successfully compete with shippers from river mines, if the differences between the total charges from those mines to final destinations and the rail rates from the Fairmont district to the same destinations are any greater than the differences prior to August 1, 1932, and aften February 16, 1934, between the all-rail rates from the districts in which the river mines are located and the all-rail rates from the Fairmont district (R. 1030).

In addition The Consolidation contended, and is contending here, that it and other producers of coal at inland mines were unduly prejudiced by the ex-river rates to their great injury; that the Commission's report and order in the *Third Ex-River Case* are supported by substantial evidence; and that they are not based on an erroneous construction of law.

SUMMARY OF ARGUMENT.

The *First Ex-River Case* involved only rail rates from Colona and Conway to the Youngstown group, and the *Second Ex-River Case* only rates from ports on the Wheeling's river division to Cleveland, Lorain, etc., but not to Youngstown. The record in the first case was not incorporated in the second case. The whole ex-river adjustment was prospective. Then the Commission decided the *Ohio Coal Cases* in which it found reasonable all-rail rates from districts in western Pennsylvania and northern West Virginia to northeastern Ohio, and required the Ohio State rates to be advanced to their former level. In so doing the

Commission rejected the measures it had used in the ex-river cases and applied a higher measure as a test of reasonableness.

Ex-river coal was then moving in large volume. The Commission reopened the two ex-river cases, consolidated them for further hearing, and upon the conditions then shown as to competition, transportation, etc., concluded that the ex-river rates previously approved by divisions of the Commission were "unreasonably low," and were disrupting the all-rail adjustment maintained by the same carriers. It required those unreasonably low rates to be increased to a higher level more nearly aligned with the all-rail rates. Shippers who could not use the ex-river rates were losing business to competitors enjoying the much lower ex-river rates, and were shown to be unduly prejudiced. The Commission found that the ex-river rates resulted in undue preference and prejudice which it ordered removed. The Commission was justified by the comprehensive record before it in requiring the ex-river rates to be increased, thus reducing the undue spreads between them and the all-rail rates.

In reply to Brief for Appellants we call attention to this Court's rulings that the validity of the Commission's order does not depend upon the correctness of each finding of fact but upon whether there is substantial evidence to support the order; that the courts will not weigh the evidence, substitute their judgment for that of the Commission, inquire into the soundness of the Commission's reasoning, or consider whether its findings are consistent with those in other cases.

Much of Appellants' argument is unsound because they have overlooked the finding in the *Ohio Coal Cases* that the all-rail rates from Pittsburgh, Connellsville, and Fairmont to Youngstown, Cleveland, etc., are reasonable; and have insisted that the Commission could only change the findings of the two divisions as to reasonableness if a change

in conditions were shown, although the Commission was reviewing the reports of those two divisions on re-opened records.

Appellants have erred in construing *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, as holding that an order to remove a violation of Section 3 (1) must be in the alternative, for Section 15 (1) specifically authorizes the Commission to prescribe maximum, minimum, or absolute rates to correct a violation of Section 3 (1).

The record does not sustain Appellants' contentions that the Commission's findings were not supported by evidence, or that it did not make adequate findings.

ARGUMENT.

The Consolidation is a large producer in the Fairmont district of West Virginia.

Cleveland is one of the most important markets in northeastern Ohio.

The following table compiled from Exhibit F-7, R. 1393; Exhibit F-8, R. 1396; R. 154, 686, 690, 716; reports in *Ohio Coal Cases* and in the *Third Ex-River Case,* R. 1545, 23, is illustrative of the rates and distances:

Distances and Rates in cents per net ton.

		To										
		Youngstown					Cleveland					
		All-rail rates			Ex-river rates			All-rail rates			Ex-river rates	
From	Average miles all routes	Prior to Aug. 1, 1932	Aug. 1, 1932	Since Feb. 16, 1934	July 16, 1932	Approved Third Ex-River case	Average miles all routes	Prior to Aug. 1, 1932	Aug. 1, 1932	Since Feb. 16, 1934	July 16, 1932	Approved Third Ex-River case
Ohio No. 8 district	122	134	134	134	--	--	159	174	145	174	--	--
Pittsburgh district	100	134	134	134	--	--	174	[a] 184	[a b] 184	[a] 184	--	--
Moundsville district	[c]	[d] 134	[d] 134	[d] 134	--	--	[c]	184	184	184	--	--
Connellsville district	142	142	142	142	--	--	219	190	190	190	--	--
Fairmont district	190	[e] 158	[e] 158	[e] 158	--	--	267	199	199	199	--	--
Conway, Pa.	[f] 43	--	--	--	77	90	[f] 124	--	--	--	127	[b] 145
Colona, Pa.	[f] 41	--	--	--	77	90	[f] 115	--	--	--	127	[b] 145
Mingo Junction, O.	[g]	134	134	134	--	--	[f] 135	174	145	174	127	145
Martin's Ferry, O.	[g]	134	134	134	--	--	[f] 147	174	145	174	127	145
Bridgeport, O.	[g]	134	134	134	--	--	[f] 155	174	145	174	127	[b] 145

[a] From certain mines in the Panhandle area of West Virginia the rate was 174 cents.

[b] From mines on the P. & W. Va. Ry. it was 155 cents.

[c] Distance not given in record.

[d] From some mines the rate was 142 cents.

[e] From a part of the Fairmont district the rate was 164 cents.

[f] Ex-river.

[g] Distances from these specific points not shown of record. They are in the Ohio No. 8 district.

[h] Strictly speaking the only rates to Cleveland before the Commission in the *Third Ex-River Case* were those from the Wheeling's river division but rates had been published from these other ports.

It will be noted that from Fairmont the all rail-rates are higher than from each of the other districts shown. There are no ex-river rates from the lower ports to Youngstown. The average of the distances to Cleveland from the lower ports is only slightly less than the average distance from Ohio No. 8 district in which those ports are located.

The same carriers which publish the ex-river rates serve, either directly with their own rails or through their connections, The Consolidation's Fairmont mines as well as other rail mines in the Fairmont, Connellsville, Pittsburgh and Freeport districts (R. 1232-A; 1384-A, Exhibit F-1; R. 1386-A, Exhibit F-3).

The appeal before this Court is from the decree in one, only, of the two cases before the court below, which were consolidated for trial (R. 184). Appellants may confine their argument accordingly to the rates from Colona and Conway to Youngstown, the points directly involved in the case appealed. But it is very important to have the whole situation in mind. In the *First Ex-River Case* only proposed rates from Colona and Conway to Youngstown and group were in issue and in the *Second Ex-River Case* only proposed rates from ports on the Wheeling's river division to Cleveland, Lorain, etc., but not to Youngstown, were in issue.

Each of these two cases dealt only with proposed, and suspended, rates. No ex-river rates were in effect. There had been no ex-river movement and none of the three respondent carriers had any facilities for transferring coal from barges to cars. It had not even been determined whether the Pennnsylvania and the P. & L. E. would each have its own facilities or whether they would enter into a joint arrangement. The whole ex-river adjustment was prospective.

But when the *Third Ex-River Case* was heard conditions had materially changed.

The Pennsylvania and the P. & L. E. had constructed separate facilities at Conway and Colona, respectively. The Wheeling had not built its transfer plant, but, as stated above, private facilities were available and used at some of its ports. Ex-river rates had been established in accordance with the reports in the first two cases, respectively, and, besides, ex-river rates had been published by the Pennsylvania and the B. & O., from their lower ports, and additional destinations had been added. Ex-river coal was moving in large and increasing volume. The ex-river rates had been responsible, in part at least, for reductions in Ohio State all-rail rates (R. 1474). The Commission, after investigation, had determined in the *Ohio Coal Cases* that the Ohio all-rail rates were unduly prejudicial to interstate shippers and localities; that the interstate rail rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts to northeastern Ohio were reasonable; and had required the Ohio State rates to be raised so as to be not less than those in effect immediately prior to August 1, 1932 (R. 1604, Appendix D).

In the second case Division 4 did not have before it the record in the first case, theretofore decided by Division 5, and, in the first case, Division 5 of course did not have before it the record in the second case, as yet unheard. Both were suspension cases.

The *Third Ex-River Case* was a further hearing of the two prior (suspension) cases and the Commission had before it the records in both of those cases. Additional evidence was taken in both cases. A single order entitled in both cases was entered (R. 1540-1542).

Consequently the Commission's order now under review was based not only on the two previous records, then considered together for the first time, but also on new evidence in both cases. In the court below there were two cases which, taken together, covered all the ex-river rates included in the order.

Therefore, this Court should not confine its consideration to the rates from Colona and Conway to Youngstown. That would result in an inadequate view of the situation and of what the Commission had before it for decision. All of these ports are on the same river, and the rates therefrom are on the same commodity, coal, to markets in northeastern Ohio.

Incidentally, of the 828,000 tons of ex-river coal which moved in the first ten months following establishment of the ex-river rates only 226,000 tons, something over one-quarter, moved to points in the Youngstown group (Youngstown, Warren, and Struthers), and of that quarter practically none moved through the lower ports (Exhibits F-30 and F-31, R. 1430-1436).

In the *First Ex-River Case* one of the principal measures or yardsticks applied by Division 5 to the ex-river rates seems to have been the Holmes & Hallowell scale by use of a percentage thereof (R. 72, 84). In the *Second Ex-River Case* the measure used by Division 4 was the rate to Youngstown approved in the *First Ex-River Case* plus the usual all-rail differential of Cleveland, and of the other destinations considered, over Youngstown (R. 85, 97).

In the *Ohio Coal Cases*, however, the Commission refused to use the Holmes & Hallowell scale as a measure for the all-rail rates, and tested them by other all-rail rates in the same territory, a different and higher measure (R. 1545, 1557, 1575).

In the *Third Ex-River Case* the Commission without a single dissent found that the rates approved by the Divisions in the two prior cases were "unreasonably low" to the extent indicated, and approved ex-river rates more closely aligned with the all-rail rates then recently approved or prescribed by it in the *Ohio Coal Cases*.

As stated, our concern is with the relationship between the ex-river rates and the all-rail rates. In each of the three reports in these ex-river cases the maintenance of

the proper relationship between the ex-river rates and the all-rail rates is emphasized, and it is said that no ex-river rates should be established so low as to disrupt the all-rail rate adjustments.

As a matter of fact the first ex-river rates established in July, 1932, immediately disrupted the all-rail rate relationship. Their establishment was an important cause contributing to the reductions by the Wheeling of rates from mines on its lines in Ohio to northeastern Ohio effective August 1, 1932, which resulted in the *Ohio Coal Cases* (R. 1478, 1568).

In the *First Ex-River Case* Division 5 said (R. 83):

> "It clearly appears that if rates are to be established on this ex-river coal which will induce its free movement from the river mines to Youngstown and points grouped therewith, they must not be any higher than the level of the all-rail rates from the same general producing districts, and that any ex-river rate which may be established must afford a basis for the subsequent establishment of rates from Conway and Colona to Cleveland, Canton, Toledo, and other large consuming points or for transshipment at lake ports to the head of the lakes, otherwise undue prejudice may be created."

This paragraph is quoted (R. 89) in the report in the *Second Ex-River Case*, and again (R. 25) in the report in the *Third Ex-River Case*.

As pointed out in the foregoing quotation any ex-river rates established must afford a basis for the subsequent establishment of other rates.

It is very important, therefore, that, whatever the basis, it must be the same for ex-river and for all-rail rates.

We did not advocate any particular basis as a measure either for all-rail or ex-river rates. We contended before the Commission that different bases had been used resulting in different levels of rates to our undue prejudice and disadvantage and to the undue preference and advan-

tage of our competitors who can use ex-river rates. It is immaterial to us in these proceedings what basis is used so long as the same basis is applied to both and the spreads between the ex-river and all-rail rates are not undue.

The first two ex-river cases were decided before any of the ex-river rates was established. In other words, those decisions were not based upon experience but upon a situation such as, it was assumed, would exist. The report in the *Ohio Coal Cases* and the record of the last hearing in the instant cases clearly show that, judged by the facts as they existed when the *Third Ex-River Case* was heard, the ex-river rates approved in the first two ex-river cases were unreasonably low; and that, as compared with the all-rail rates maintained by the same carriers, they unduly favored ex-river shippers to the detriment of the all-rail shippers and thereby displaced an enormous tonnage formerly moving all-rail.

It must be borne in mind constantly that the ex-river rates have created no new tonnage, at least in so far as this record shows, but have merely shifted the movement to the extent already indicated.

The record of the last hearing in these cases establishes indisputably that the spreads between the ex-river rates approved in the first two reports and the all-rail rates were much too great when measured by present transportation conditions.

Although ex-river rates were not in issue in the *Ohio Coal Cases*, the Commission said in that report—"The differences between the all-rail and rail-and-water rates in many instances are too great" (R. 1570).

Except Colona and Conway, which are not in any coal-producing district, all of the ports through which ex-river coal is being moved are within the boundaries of the Ohio No. 8 district (R. 976-977).

The transfer facilities at Conway and Colona are railroad owned and operated, but those at the other ex-river

ports are privately owned and operated (R. 1008, 1014, 1023, 1024, 1097).

The service performed by the B. & O. and Pennsylvania in connection with ex-river coal is described in some detail in the record, but as the similarity in their terminal service,—river ports as compared with rail mines,—is all that we wish to emphasize for the moment, a brief summary of the testimony thereon will suffice.

The only point at which the B. & O. receives ex-river coal is West Wheeling, Ohio, about one mile south of Bridgeport, Ohio (R. 1008, 1009). There are mines in the Wheeling Creek No. 8 district on the B. & O. in the same general location as West Wheeling (R. 1009). The service by the railroad in placing empties and removing loads does not differ from its assembly service at mines which have the same track capacity, similar layouts, and load directly into cars on the B. & O. (R. 1009-1010, 1012). The "set-up" at West Wheeling is not materially different from an "average set-up at a mine at an inland point" (R. 1012).

The Pennsylvania receives ex-river coal at Conway, and formerly through three,—but at the time of the hearing through two,—facilities at the lower ports (R. 1013, 1014, 1015-1016).

The placing of empties and removing of loads by that railroad at Conway is similar in every particular to the assembly service performed by it at mines having similar layouts and track capacity (R. 1013, 1014). Conway is not in a coal-producing district and there are no mines in its immediate vicinity (R. 976).

The Pennsylvania, until just before the hearing, received ex-river coal at the Carnegie Steel Coal Dock at Mingo, Ohio. That dock is served by the Wheeling, which performed all the switching. The empties were delivered by the Pennsylvania to the Wheeling, which placed them and returned the loads to the Pennsylvania. A switching charge

was paid by the Pennsylvania to the Wheeling for this service (R. 1014-1015).

The two other facilities in that district are the Mingo Coke Dock and the Eastern Sand and Gravel Company Dock. The handling by the Pennsylvania of the empties to those docks and of the loads from the docks is identical with rail service to and from a mine tipple similarly situated (R. 1014-1015). The Mingo Junction Yard, from which these facilities are served, is the same yard from which mines in that portion of Ohio No 8 district are served (R. 1016).

At the original hearing in the *Second Ex-River Case* a witness for the Wheeling described in considerable detail the manner in which that road could handle ex-river coal if the rates then proposed were established and a movement developed. A part of that testimony related to facilities which the witness said the Wheeling had in mind to construct (R. 361). Those facilities have not been built (R. 1097, 1100).

Of course the road-haul service on ex-river coal is identical with that on all-rail coal from the same classification yard to a particular destination. In fact the two kinds of coal are intermingled and handled in the same trains (R. 1013, 1016).

Clearly, therefore, the differences between the ex-river rates and the all-rail rates from the mines were too great when measured by transportation conditions, and the Commission was justified in requiring the ex-river rates to be increased, having found the all-rail rates reasonable in the *Ohio Coal Cases*.

Northeastern Ohio, particularly Cleveland, is an important market for coal from the Fairmont district, and The Consolidation in its sales of coal from that district to consumers in northeastern Ohio encounters competition from producers in other districts, particularly in western Penn-

sylvania, the Panhandle area in West Virginia, and in eastern Ohio (R. 1029).

The following is an extract from the testimony of the witness for The Consolidation (R. 1029):

> "In the sale of our Fairmont coal to the northeastern Ohio territory we encounter competition from producers in the Pittsburgh, Connellsville, Moundsville and Ohio No. 8 and Middle districts. We encounter competition with coal which does or may move under ex-river rates. We encountered that competition on several of the largest pieces of steam business in the City of Cleveland, Ohio and vicinity, which would amount to from 200,000 to 400,000 tons, and on which there is prospect of ex-river movement, we have had the opportunity to bid on all of this business; some we have bid on and lost to ex-river shippers, some of it we refused to bid on knowing that we could not meet ex-river competition, and some of the business we did not bid on we afterwards learned went to ex-river. Some we have bid on has not, as yet, been awarded, but the ex-river shippers have underbid us to a considerable extent on a delivered price basis."

The contract last referred to in the above quotation was awarded, subsequent to the hearing, to ex-river shippers (R. 155).

The witness for The Consolidation specifically refers (R. 1030-1031) to the Costanzo and Alexander mines, in the Panhandle area of West Virginia, as competitors using ex-river rates.

The Consolidation is not the only producer of coal which has lost business as a result of these ex-river rates. Witnesses for several other companies, located principally in Pennsylvania, told of similar experiences (R. 1031-1032, 1060, 1066, 1067-1068).

The foregoing very brief résumé makes it plain that there is substantial evidence to support the Commission's findings and order particularly with respect to undue preference and prejudice. We ask that this Court should so hold and affirm the decree of the court below.

REPLY TO BRIEF FOR APPELLANTS.

I.

INTRODUCTION.

As the brief for Appellants was received after the foregoing Argument had been prepared we submit here what we have to say in reply, touching first upon a few of the principles which the Court has applied in reviewing orders of the Commission.

Long ago, in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88 (1913), this Court laid down the rule that the validity of an order does not necessarily depend upon the correctness of each finding of fact. The question is whether there is substantial evidence to support the order. This is shown by the following extract from page 98:

> "6. It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order."

In that case the proceedings before the Commission were brought, and its order in issue was made, under the Act to Regulate Commerce as amended in 1906 by the Hepburn Act but before the additional amendments made in 1910 by the Mann-Elkins Act.

By a consistent line of decisions to like effect undisturbed by any statutory change in the amendments of 1910, and later of 1920, this Court has maintained as well-settled doctrine that the courts will not weigh the evidence to determine whether it establishes undue preference, or

undue prejudice, or unreasonableness; or substitute their judgment for that of the Commission; or inquire into the soundness of the reasoning by which the Commission's conclusions are reached; or consider whether the findings are consistent with those made in other cases; but will only review the record to ascertain whether there is substantial evidence to sustain the findings and order, or whether the Commission has exceeded its statutory authority or fallen into other material error of law. *Assigned Car Cases,* 274 U. S. 564, 580-581, and cases there cited; *Virginian Ry.* v. *United States,* 272 U. S. 658, 663.

In recent cases the Court has also held that the Commission must make "quasi-jurisdictional findings essential to" the "constitutional or statutory validity" of its orders, but has pointed out that this does not call for a "complete statement of the grounds of the Commission's determination." *United States* v. *B. & O. R. Co.,* 293 U. S. 454, 464, 465.

It may be helpful and tend to brevity, if we next point out certain errors in important particulars which permeate and render unsound much of Appellants' argument.

Appellants have failed to give the full import of the Commission's decision in the *Ohio Coal Cases,* although stating (p. 32) "The chronology of the *Ohio Case* is important * * *." That report covered several proceedings (R. 1545). One was a thirteenth-section investigation which resulted from reductions made under State authority in August, 1932, in State rates from Ohio mines to certain destinations in northeastern Ohio. Such rates to Cleveland, for example, were reduced (R. 1549), but, as suggested at page 31 of Appellants' brief, *not* the rates to Youngstown. However, Appellants have omitted to say anywhere in their brief that among those proceedings were certain complaints attacking as unreasonable the all-rail interstate rates from the Freeport, Pittsburgh, Connellsville, and Fairmont districts to northeastern Ohio, *including* Youngstown as well as Cleveland, and that the Com-

mission found reasonable the interstate rates so attacked, except certain rates from mines in the Fairmont district reserved for further consideration (R. 1570 *et seq.*, 1591, 32).

In deciding the *Ohio Coal Cases* the Commission required the reduced Ohio State rates to be increased so as to be not less than those applicable prior to August 1, 1932. The rate from the Ohio No. 8 district, in which the lower ports are located, was required to be advanced to a minimum of $1.74 to Cleveland, for example.

These findings are of special significance when it is remembered that the ex-river coal from Colona and Conway moves from the nearby classification yards in the same trains as the all-rail coal moves from mines in the Pittsburgh and other districts over the P. & L. E. and Pennsylvania railroads to the same destinations in northeastern Ohio (R. 1013, 1017). See also Appellants' brief pages 6, 54. And similarly the movement from the lower ports is, from the nearby yards, in the same trains as the all-rail movement from the mines (R. 1009).

The courts, despite the vigorous protests of Ohio interests, upheld the order in the *Ohio Coal Cases* on the ground that the rates resulted in undue preference and undue prejudice between shippers and localities. The complaints of unreasonableness having been dismissed by the Commission were not directly before the courts.

Obviously, in fixing lawful ex-river rates in the *Third Ex-River Case,* reopened for further hearing a few days after the decision in the *Ohio Coal Cases* was rendered, the Commission had, and must have had, in mind the rates prescribed or approved by it in the *Ohio Coal Cases* for all-rail hauls of the same carriers for service in part, at least, over the same rails. The point will be adverted to later.

Another error running throughout the entire argument of Appellants is that, as they assert, the 77-cent rate, having been established as a reasonable maximum rate by the

"Commission" in the *First Ex-River Case*, was binding as such upon the Commission and the carriers until the carriers could show that it had become unreasonable by reason of changed conditions.

For instance (p. 66):

> "The only finding in the report of changed conditions since the determination of the case originally, is as follows: * * *"

And on pages 71-72:

> "The rate condemned in this case as unreasonably low and required by the Commission to be advanced was a rate therefore fixed by the Commission as a maximum reasonable rate."

And on page 72:

> "Moreover, the presumptions attaching to the compensatory character of a rate prescribed by the Commission, after full hearing, as a reasonable maximum rate are clearly stronger than those attaching to a rate made by a carrier."

Again, on page 136 in discussing the question of undue preference and prejudice:

> "The difference here is that the rate claimed to result in the undue preference and prejudice is a rate which was prescribed by the Commission as a reasonable *maximum* rate and which on the record is conclusively shown to be not less than a reasonable *maximum* rate. Such a rate cannot possibly be unduly preferential or prejudicial to any shipper." (Italics in original.)

And on the same page:

> "In the absence of a change in conditions or circumstances between the time of the establishment of that rate and the time of the hearing before the Commission in this *Third Ex-River Case*, it is a presumption of law that that rate continued not only to be a reasonable maximum rate but that it likewise continued to

be a non-preferential and non-prejudicial rate. The record shows no such change in conditions or circumstances."

There are many statements elsewhere in the brief based on the same thought.

What we wish to point out here is that the very question before the Commission in the *Third Ex-River Case* was whether the decisions of two separate Divisions in the other two cases were correct, the records in those cases and additional evidence being before the Commission. But even if the Commission, as distinguished from a division, had itself fixed the 77-cent rate, that is no ground for asserting that the Commission on reopening and reconsidering its own prior decisions in the same proceedings and upon the same records, could not reach an entirely different conclusion, even though there were no change in conditions and no new evidence before it. Otherwise what could be accomplished by a review or reconsideration?

Of course the question here is whether the ultimate finding that 90 cents is a reasonable and non-prejudicial rate is supported by proper findings resting upon substantial evidence. That cannot be answered, or prejudged, by the prior findings which were under review in that case.

It is noteworthy that although Division 5, composed of three commissioners, decided the *First Ex-River Case*, and Division 4, composed of three other commissioners, decided the *Second Ex-River Case*, there was no dissent from the report by the entire Commission in the *Third Ex-River Case*.

It hardly seems necessary to remind the Court that this appeal does not bring before it for review, either the two *Lisbon Cases* or the first two *Ex-River Cases*, but only the *Third Ex-River Case*.

We again ask attention to the fact that, in addition to the rates from Colona and Conway to Youngstown, the Commission also had before it closely related rates from the lower ports to Cleveland, and considered the situation

as a whole. The parts of its report and order which relate to the rates from Colona and Conway to Youngstown must be viewed in the light which the record supplied to the Commission, namely, the situation as a whole, and not merely a part of it.

Our primary concern here is with the relationship between the all-rail rates and the ex-river rates. By that we mean the relationship between the ex-river rates charged by the rail carriers for their service from the ports to the destinations to which ex-river rates are published, and the rates for the all-rail service of the same carriers, either directly or with their connections, from our mines in northern West Virginia to those same destinations. Undue preference and undue prejudice will result unless the ex-river rates bear the relation to the all-rail rates which is justified and required by the conditions surrounding the movements, respectively, from the ports under the ex-river rates and from our mines under the all-rail rates.

We therefore address ourselves next to those parts of Appellants' brief which deal with undue preference and prejudice, Point III, commencing at page 119.

II.

UNDUE PREFERENCE AND PREJUDICE.

It should be borne in mind, in discussing the question of undue preference and undue prejudice, that the carriers publishing the 77-cent ex-river rate from Colona and Conway to Youngstown had been urging and defending their proposed rate of $1.02, whereas the Wheeling had been urging and defending the establishment of a minimum rate from its lower ports to Cleveland; also that, after establishment of the 77-cent ex-river rate from Colona and Conway to Youngstown, there was in effect an ex-river rate from Colona and Conway to Cleveland the same as that published by the Wheeling, P. R. R., and B. & O. from the lower ports to Cleveland. The whole situation was tied up

together. Obviously if the Commission fixed a maximum reasonable rate from either or both sets of ports the Wheeling could publish rates less than the maximum and thereby defeat the establishment of maximum reasonable rates from its own ports, and the other carriers could have no higher rates from competing ports. In addition the Commission had fixed, in the *Ohio Coal Cases*, a minimum all-rail rate from Ohio No. 8 district, in which the lower ports are located, and had found reasonable the all-rail rates from Connellsville and Pittsburgh to Youngstown, Cleveland, etc. Therefore if the Commission was to be successful in preventing undue preference and undue prejudice between the ex-river and all-rail rates, it must in some way fix a proper relation between the all-rail rates and the ex-river rates. In order to keep the ex-river rates in line with the all-rail rates which it had already prescribed or approved, the Commission must necessarily establish minimum ex-river rates as well as a proper relationship between those rates and the all-rail rates. This it did.

Of course the Commission's findings as to the rates and the relationship must be supported, as they are, by substantial evidence.

III.

APPELLANTS' CONTENTION THAT THE COMMISSION EXCEEDED ITS POWERS IN ORDERING REMOVAL OF UNDUE PREFERENCE AND PREJUDICE IS GROUNDLESS.

It is not clear to us just what is the meaning of the paragraph at the bottom of page 120. When read in the light of the reference to the decision cited, *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, hereinafter sometimes called the *Texas & Pacific Case*, and with the paragraph that follows, apparently the contention is that, in ordering a removal of a violation of Section 3 in respect of rates,[9] the

[9] Reference herein to Section 3, means paragraph (1) of that section, the only portion of the section with which we are concerned.

Commission must afford the carrier its choice of alternative methods of removing the violation, *i. e.*, by raising the lower rate, lowering the higher rate, or altering both, and that it committed error here by fixing a minimum rate and thus depriving the carrier of its option between alternatives.[10]

Section 3 prohibits the undue preference and undue prejudice therein defined, but confers no authority upon the Commission to order any removal of such violation of that section as it may find to exist. The Commission derives its authority to enter such an order from Section 15(1). Section 3 has not been amended since its original enactment, but Section 15 has. In other words the offense of undue preference or undue prejudice has not been changed, but the authority and power of the Commission to remove undue preference and prejudice has been changed by the various amendments to what is now paragraph (1) of Section 15.

Section 15(1), set out together with Section 3(1) in Appendix A hereto, is one single sentence, and provides in part:

> "That whenever * * * the Commission shall be of opinion that any * * * rate * * * is or will be * * * unduly preferential or prejudicial * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation * * * and shall not there-

[10] Although the language of some of the assignments of error is broad enough to include a contention that the order, in so far as it requires a removal of undue preference and prejudice, is void because it does not afford an alternative method of removing the preference and prejudice, yet this question was not raised in the court below, despite the fact that the *Texas & Pacific Case* was decided before the bill was filed in that court. The point is not mentioned in the opinion below. We do not believe therefore that it is properly before this Court.

> after publish * * * any rate * * * less than the minimum so prescribed * * *."

In other words the language of Section 15(1) in terms authorizes and empowers the Commission to prescribe a minimum rate to remove a violation of Section 3.

Therefore, if this Court has held that the Commission must afford an alternative in ordering the removal of a violation of Section 3 it must have read these provisions out of Section 15(1) or have placed some limitation upon them. Has it done so?

The legislative history of Section 15(1) shows that one of the purposes in granting authority to the Commission to prescribe minimum rates by order was to enable it thereby to effect the removal of undue preference and prejudice in cases where the prescribing of a maximum rate would not accomplish this purpose.

Prior to the amendment of 1906 the Commission had no power to prescribe rates either maximum, minimum, or absolute. *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479.

After that decision was rendered the Commission asked Congress for the power to prescribe minimum rates as a means of removing or preventing discrimination and undue preference and prejudice. Eleventh Annual Report, 1897, pages 25, 142-143, Twelfth Annual Report, 1898, page 26.

The amendment of 1906, 34 Stat. 584, had given it power, (Section 15, first paragraph), wherever it found any rates—

> "are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial * * * to determine and prescribe what will be the just and reasonable * * * rates * * * to be thereafter observed in such case as the maximum * * *."

In 1920 Section 15 (1) was made to read as already shown, and gave the Commission authority to prescribe

absolute and minimum as well as maximum rates to remove such violations of the Act as it found to exist.

In the course of the debates in Congress preceding the passage of the 1920 amendments, Senator Cummins, in charge of the bill, on December 17, 1919, answered certain remarks made by Senator Jones of Washington, who was supporting a motion to strike out the minimum-rate provision. This was prior to the conference between representatives of the two houses. Senator Cummins suggested that the provision be left in the bill so that it might be taken up in conference. He then explained the provision as follows:

> "The bill gives the Commission the right to establish a minimum rate upon a railway precisely the same as the House bill does, and I think nearly everybody agrees that the authority ought to exist *to make minimum rates in order to prevent discrimination.*" (Italics ours.)

(*Congressional Record*, Vol. 59, p. 742.)

In the light of the foregoing it seems strange that if this Court were construing the provisions of Section 15 (1) and intended to place a limit on the actual language of that section, it should not have quoted its provisions or, at least, have summarized them. But nowhere in the decision in the *Texas & Pacific Case* is Section 15 (1) quoted or summarized. Furthermore, it would seem unlikely that the Court would place such a decided limitation upon the kind of order the Commission had power to issue under Section 15 (1) when the question was not in the case. For many years the Commission, in determining the existence of undue preference and prejudice and the carriers' responsibility therefor, had applied the test commonly known as the Ashland Fire Brick doctrine. In the *Texas & Pacific Case* the Commission departed from it, and this Court, holding that the Commission was in error in so doing, reestablished the doctrine, which is thus explained in *Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115 (1911) at page 120:

"It is true that we have held in cases where joint or proportional rates were made by all of the carriers leading to certain points of destination that it was within our power to end a discrimination as between points of origin by a reduction in the rate from a certain point that was discriminated against. *Indiana Steel & Wire Co.* v. *C., R. I. & P. Ry. Co.*, 16 I. C. C. Rep., 155; *Railroad Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 17 I. C. C. Rep., 118. This principle, however, only has application where the traffic from both groups of origin is *necessarily* transported to destination by the same connecting carrier or carriers and where it is possible for the delivering carriers to put an end to the discrimination by the exercise of their power to refuse to enter into preferential joint or proportional rates. The Frisco and the Mobile & Ohio have through lines from St. Louis to Birmingham, the principal market in controversy here, and therefore control the rates for the full distance. The record in this case does not reveal that any of the traffic from St. Louis, as well as from Ashland, is delivered at any points of destination by carriers who are an essential part of the two through routes." (Italics in original.)

Then follows this statement which gives the test of whether the discrimination was undue:

"The test of the discrimination is the ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."

For many years the carriers serving New Orleans had equalized rates from interior points to that port with those from the same origins to Galveston. The Commission in *Galveston Com. Asso.* v. *Galveston, H. & S. A. Ry. Co.*, 160 I. C. C. 345, its third report in that case, found undue prejudice to the Texas ports and undue preference of New Orleans to the extent indicated (pp. 359-360).

The order attached to that report (which the Court does not quote) required in part that the defendants establish

on the commodities in question from or to interior Texas points from which the distances—

> "to New Orleans do not exceed those from the same points to Galveston by more than 25 per cent, rates which do not exceed the corresponding rates contemporaneously maintained to or from ship side at New Orleans; and (2) to or from points on the Texas & Pacific Railway and the Louisiana Railway & Navigation Company of Texas from or to which the distances, determined as aforesaid, to New Orleans exceed those from the same points to Galveston by more than 25 per cent, rates which are less by the following minimum differentials, per 100 pounds, than the corresponding rates contemporaneously maintained to or from ship side at New Orleans:"

At page 123, footnote 2, Appellants erroneously state that the order in that case is very much like the order in the instant case, and that it was not in alternative form. The order in that case was in the alternative, and if the same carriers had controlled the rates to Galveston and to New Orleans, they could have complied with the order either by advancing the rates to New Orleans or reducing the rates to Galveston, or changing both.

Appellants are also in error in stating in that footnote that in the instant case the Commission fixed minimum differentials. On the contrary the effect of the order is to fix a maximum differential, for the order requires that the ex-river *rates*—

> "shall not be less than the following: from Colona and Conway to Youngstown 44 cents under the contemporaneous all-rail rates maintained by respondents on like traffic from the Pittsburgh district * * *." (R. 1541-1542).

In other words, in so far as that part of the order is concerned, the ex-river rate could be raised or the all-rail rate could be lowered. The effect of that particular provision is that the difference between the ex-river and the all-rail

rates should not be greater than 44 cents. It could be less.

The Court thus states the issues in the *Texas & Pacific Case* (pp. 633-634):

> "The appellants contend that in the circumstances disclosed the ports as such are not localities preferred or prejudiced, but that if they may be so denominated the Texas & Pacific and the L. R. & N. can not be held responsible for any undue prejudice to the Texas ports, since they do not reach those ports with their own lines or control the rates to or from them. They also assert that the orders violate Article I, § 9, of the Constitution, which prohibits any regulation of commerce giving preference to ports of one State over those of another; are without support in the evidence, and arbitrary."

It will be noted nothing is said of any issue as to whether the Commission's order had to afford an alternative.

The only one of those issues with which we are here concerned is whether the T. & P. and L. R. & N. could be held responsible for any undue prejudice, that is whether the Commission had properly applied the *test* of what constituted the undue preference and prejudice prohibited in Section 3. That test is the one found in the *Ashland Fire Brick Case.*

There was no finding that the rates to Galveston were too high or that the rates to New Orleans were too low. As the Court says (p. 631) the issue was narrowed to one of prejudice to the Texas ports and preference of New Orleans.

The Texas & Pacific Ry. and the L. R. & N., serving New Orleans, attacked the order on the ground that they could not be held responsible for any undue prejudice to the Texas ports since they do not reach those ports with their own lines or control the rates to or from them.

The Court says (pp. 646-647):

> "By its second order the Commission excluded the Texas & Pacific and the L. R. & N. from its findings of

undue preference and prejudice and exempted them from the requirement as to differentials. The Texas & Pacific had been included by the first order on the theory that it was part of the Missouri Pacific system which served both New Orleans and the Texas ports. Upon rehearing the conclusion was that the line was independently operated. Exemption was thereupon granted both appellants pursuant to a rule which the Commission had consistently followed since its organization; namely, that a carrier may not be held responsible for undue prejudice or preference unless both of the localities affected are upon its lines, or it effectively participates in the rates to both. In the final report these roads were denied exemption under the belief that this court had held the principle inapplicable in the circumstances here discussed. The appellants insist the rule is a reasonable one, consonant with the purposes of the Act, and that our decisions have not narrowed it so as to exclude this case from its scope."

The rule referred to by the Court is that laid down in *Ashland Fire Brick Case.*

It is obvious that the sole question was whether the Commission was justified in its departure from that long-established rule, which refers to the *test* of what constitutes the undue preference and prejudice prohibited by Section 3 and not to the kind of order that could be issued under Section 15 (1) to remove the violation of Section 3 as disclosed by that test.

The Court says (p. 648):

"The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge."

After giving other instances of undue preference or prejudice for which a carrier may be held responsible, the Court continues in the same paragraph (pp. 649-650):

> "Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to be withdrawn as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it.[37] This rule has been consistently applied in respect of export and import rates to the ports.[38] The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under §3 an alternative must be afforded.[39] The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Penna. R. Co.*, 266 U. S. 191; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 292; *Minneapolis & St. L. R. Co.* v. *Peoria & Pekin U. R Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative."

Appellants' argument is really based upon a single sentence, lifted from its context, and quoted at page 121 of their brief,—"Where an order is made under Section 3 an alternative must be afforded." We say lifted from its

context because it is at once apparent from the context that the inferences sought to be drawn by appellants are not supported.

Section 3 does not authorize the Commission to issue any order at all, therefore when the Court says "Where an order is made under § 3" it is obviously using some convenient form of expression, the meaning of which must be ascertained from the context. A reading of the paragraph as a whole, including footnotes 37, 38 and 39, to say nothing of the remainder of the decision, shows indisputably that the Court is discussing the *test* to be applied to determine whether there is a violation of Section 3 and not the *form of order* which may be issued to remove the violation.

A study of the cases referred to in footnote 37 shows that the "doctrine" the Court had in mind was the *test* of undue preference and prejudice and not the kind of order which the Commission could issue to remove undue preference and prejudice when found.

The only other sentence in the entire decision which tends to lend any support to Appellants' argument is the one following that already discussed, and reads (p. 650):

> "The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both."

After that sentence the Court says "compare" four cited cases.

The first case cited is *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. This case was decided in 1917, prior to the amendment to Section 15 (1) which we are now considering. The order was in the alternative.

In the second case cited, *United States* v. *Penna. R. Co.*, 266 U. S. 191, in so far as the immediate discussion is concerned, it was argued, in effect, that the Commission had compelled the carriers to extend their service, or the use of their tracks, by ordering the removal of what it improperly found to be a violation of Section 3, instead of by

making findings upon proper allegations, and duly supported by evidence, of violations of other sections of the Act, accompanied by appropriate orders to remove the violations, if found, of those sections. In answer the Supreme Court points out that the orders were truly in the alternative, and proper under the findings of violations of Section 3. That is, there actually was undue preference and prejudice in violation of Section 3, as found by the Commission; the Commission had ordered it removed; and the Commission had not attempted to cure by indirection some other violation of the Act.

In the third case mentioned by the Supreme Court, *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, the Commission had ordered three carriers serving Michigan City to cease a prejudice and preference caused by their refusal to make arrangements for interchange there of traffic with the complaining electric line while maintaining such arrangements with other carriers. The railroads seeking to enjoin the order contended that under guise of a discrimination order the Commission sought to compel them to extend their service.

In answer the Court said (pp. 292-293):

> "The order does not require the steam railroads to extend any service to the South Shore (the electric line). It leaves them free to remove the discrimination by appropriate action. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 521."

The language at the page referred to in the last citation, *Minneapolis & St. L. R. Co.* v. *Peoria & Pekin U. R. Co.*, 270 U. S. 580, 582, is merely explanatory of the facts.

In none of the four cases was the question whether the *order* of the Commission must be in the alternative in a case where undue preference and prejudice was actually found to exist.

That the Court did not intend by the two sentences now under discussion to say that an "order," in the sense of a requirement, to remove a violation of Section 3 must be in the alternative, but was in reality laying down one of the tests of undue preference and prejudice, is clear, not only from what has been said above, but from the following sentence which concludes the paragraph in which those two sentences appear (p. 650):

> "The *situation* must be such that the carrier or carriers *if given an option* have an actual alternative." (Emphasis added.)

Obviously the "situation" that the Court means is what it started out to discuss and is discussing all through the paragraph, namely, when can a carrier be held guilty of undue preference and prejudice, or what is the *test*; not what kind of order may be issued after the violation is found. If it were the latter the Court would hardly have said "*if* given an option," for that phrase would have rendered the sentence meaningless if the Court had been ruling that the *order must* give the carriers an alternative.

In the next paragraph (p. 650) the Court says the "principle" has been approved in four cases which it cites, three of which were decided long prior to the amendment to Section 15 (1) in 1920, and an examination shows that in all four of them the "principle" approved was that of the *Ashland Fire Brick Case* and not one dealing with the kind of order the Commission could issue.

The only one of those four cases decided since the amendment of 1920 is *Central Railroad of New Jersey* v. *United States*, 257 U. S. 247. The Court (pp. 650-651) quotes from it to the effect that a carrier could not be held responsible for a discrimination not the result of its own act and that:

> "What Congress sought to prevent by that section [3], as originally enacted, was not differences between localities in transportation rates, facilities and priv-

ileges, but unjust discrimination between them *by the same carrier or carriers.*" (Emphasis added.)

The Court then says (p. 651):

> "While this language was used with respect to circumstances differing from those here disclosed, it applies to the situation of appellants, who are by the Commission's order held responsible for what is not and cannot be the result of their own acts, the level of the rates to the Texas ports."

The Court then takes up (pp. 651, *et seq.*) the contention that the Commission concluded that in later cases the Court had held the "principle" inapplicable in circumstances so like those in the *Texas & Pacific Case* that it should control the Court's decision in that case. For brevity we do not comment upon the several cases referred to by the Court, which are the ones relied upon by the Commission for its change of view with respect to the doctrine of the *Ashland Fire Brick Case*. The Court concludes its entire discussion of this question as follows (pp. 654-655):

> "We find nothing in any of the decisions which renders inapplicable the principle upon which the Commission has acted, with the approval of this court, for more than forty years in the administration of § 3, and conclude that the New Orleans lines could not properly be held guilty of unjust discrimination against the Texas ports in the absence of a finding of effective participation in the rates to them."

It will be noticed that this conclusion deals entirely with the question of whether the New Orleans carriers could be held responsible for the undue prejudice. Not one word is said about the type of order that could be issued. Certainly if the Court intended to pass upon that question its conclusion would have contained some reference to it.

The foregoing clearly shows that the *Texas & Pacific Case* is not authority for a contention that an order of the

Commission to remove a violation of Section 3 must be in the alternative.

We might note in passing that the Commission has many times between 1920 and the decision of the *Texas & Pacific Case* in 1933, held that it did have power to prescribe specific rates to remove undue prejudice.

For example: *Arkansas Jobbers & Mfrs. Asso.* v. *Director General*, 59 I. C. C. 662; *Chicago Gravel Co.* v. *A., T. & S. F. Ry. Co.*, 118 I. C. C. 633; *Tacoma Traffic & Transp. Bureau* v. *N. P. Ry. Co.*, 87 I. C. C. 507; *Blanchard Lumber Co.* v. *Boston & M. R.*, 172 I. C. C. 522; *Ridenour-Baker Mercantile Co.* v. *A., T. & S. F. Ry. Co.*, 88 I. C. C. 273; 113 I. C. C. 629; *J. I. Decker* v. *Chicago, B. & Q. R. Co.*, 190 I. C. C. 486.

The foregoing sufficiently answers Appellants' contentions of law as set out on pages 119-126 (top of page) of their brief.

As we said, Section 3 defines the standards for determining whether undue preference and prejudice exist, and prohibits undue preference and prejudice. It prescribes no remedy. Section 15 (1) does not define or prohibit undue preference and prejudice but provides the remedy. There is nothing in the language of Section 15 (1) which subordinates the power to remove undue preference and prejudice to the power to prescribe just and reasonable rates. They are *in pari materia*, and in a proper case the Commission may exercise both powers, or either power, or neither.

In paragraph "3" (pp. 122-123) Appellants assert that the Commission expressed doubt as to its authority to remove the undue preference and prejudice, and set out three grounds for their assertion.

While disagreeing with the construction Appellants place on the language quoted from the Commission's report (R. 45), we merely say with respect to the first ground, that we at least do not contend that the Commission could equalize "fortunes, opportunities or abilities," nor do we think that

it has attempted to do so. The other grounds are answered by what has been said above.

Commencing at the top of page 126 of Appellants' brief is an argument based on five grounds to show that the facts do not establish a violation of Section 3.

The first ground advanced (p. 127) is that the preference and prejudice, if any, are the result of geographical advantage and disadvantage.

As already said we do not contend that the Commission can or did make rates to equalize such advantages.

Appellants say (p. 127), that the court below—

> "concluded it was not the geographical advantage of the river companies which resulted in the prejudice and preference but that it was the ex-river rate because 'it was only after the 77-cent ex-river rate became effective that the coal began to move' (R. 136)."

The next two sentences of the court, not quoted by Appellants, are (R. 136):

> "If after the establishment of the maximum ex-river rate undue prejudice resulted to the inland coal mines, *we are unable to say* upon this record *that no part of such prejudice was due to the rate.* That is for the determination of the Commission upon the evidence." (Emphasis supplied)

When these three sentences are read together they show how clearly the court understood the question, that is,—Did the ex-river *rate* cause any undue prejudice?

The ex-river rates, that is, the rates charged by the rail carriers for their service from the ports to the destinations of the coal, must be reasonable and free from undue prejudice or preference, irrespective of such geographical advantage or disadvantage as any mine may have.

The second ground (p. 130) is that the undue preference and prejudice, if any, are not the result of the voluntary and wrongful act of the rail carriers.

The only portion of this topic which needs comment here is that quoted below. It would not be worthy of notice if emanating from less distinguished counsel.

It is said (p. 132):

> "Furthermore, in respect of the 77c rate itself, that rate was, in effect, a rate compelled by competition. The history back of the establishment of the 77c rate shows that such rate came into existence as the result of an alternative proposal by the Pennsylvania and the Pittsburgh & Lake Erie to meet the threatened competition of the Lisbon's proposed ex-river rate of from 50c to 75c. A rate established for the purpose of meeting competition is not a rate which comes within the condemnation of Section 3 (1). *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 192 [197]; *East Tennessee V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627; *Ashland Fire Brick Case*, 22 I. C. C. 115."

Appellants have repeatedly and emphatically stated that the 77-cent rate had been fixed by the Commission as a maximum reasonable rate, and have intimated their view that even this rate exceeded the maximum of reasonableness. But here, for the first time in our experience, we find a commission-made rate characterized as being "• • • in effect, a rate compelled by competition." Appellants cite no authority or precedent therefor. The "competition" was with an estimated rate which the Lisbon thought it could afford to apply if authorized to construct and operate its proposed branches. Neither they nor the rate ever came into existence.

Incidentally, it may be noted that when respondent carriers undertook to establish a rate from Colona and Conway to Youngstown they proposed a rate 25 cents higher than this 77c "competitive" rate, and ever since have insisted that it would be a proper rate. The competition apparently did not force them to as low a level as it did the Commission.

It is true that under certain circumstances a rate established to meet competition is not a rate which comes within the condemnation of Section 3. Analysis, however, of the cases cited shows that they dealt with situations entirely different from that now before this Court.

In the first case the question was whether the rail carriers from New Orleans to San Francisco could charge a lower rate on traffic from Europe through New Orleans to San Francisco than they charged on traffic originating in this country and moving from New Orleans to San Francisco. It was necessary for these carriers to meet through New Orleans the competition with ocean carriers via water routes from Europe to San Francisco, a competition over which they had of course no control.

In the second case cited the carriers charged a lower rate on traffic from the Atlantic seaboard moving through Chattanooga to Nashville than they charged upon similar traffic from the Atlantic seaboard to Chattanooga. The lower rate to Nashville was forced by competition with lines which did not serve Chattanooga, and was therefore beyond the control of the lines serving Chattanooga.

The other two cases have already been discussed.

In the instant case, however, we find present the very elements which were lacking in those cases and upon the lack of which the decisions turned. Here the coal from the inland mines and from the river mines originates in the same origin territory, the mine in some instances being both a river and a rail mine. It moves to the same destinations, and the movement from the river port to final destination of the coal originated at the river mines is by the same rail carrier or carriers which, directly or through their connections, move the coal all-rail from the inland mines to the same destinations. There is, therefore, no competition which is beyond the control of the rail carriers, and they are responsible for and can control all of the rail rates in question here.

The question, therefore, is whether the Commission, having fixed or approved the all-rail rates in the *Ohio Coal Cases,* has prescribed ex-river rates, and a relationship between ex-river rates and all-rail rates, which properly measure the difference, if any, in conditions surrounding the respective movements of traffic from the river ports and from the inland mines.

The third, fourth and fifth grounds asserted by Appellants have been sufficiently answered in the preceding portions of our brief.

In paragraph "7" (p. 137) Appellants urge that the evidence is insufficient to support the finding of undue prejudice, and that the findings are insufficient to support the order.

In the first paragraph it is pointed out, apparently to show the lack of prejudice, that only five operators of inland mines offered evidence to show undue prejudice to them. Even if only one operator was unduly prejudiced the prejudice would have to be removed. In fact, since these were Investigation and Suspension proceedings under Section 15 (7) the Commission must consider the "lawfulness" of the rates which means lawfulness under all sections, irrespective of how many operators testified.

They urge the lack of that sufficient proof of loss regarded by the Commission as necessary to sustain a finding of undue prejudice within the meaning of Section 3.

At page 139 Appellants say:

> "The economic depression, of which this Court will take judicial notice, also had an effect on the coal business during the entire period under discussion."

This is true. That has caused loss to both inland and river mines. But there is no suggestion or claim or testimony anywhere in the entire record that the inland mines have lost business to the ex-river mines because of the depression.

Appellants state (p. 139) that:

> "The sum and substance of the evidence of the five witnesses for the inland mines are that, since the effective date of the ex-river rates, they had been underbid on coal for delivery at northeastern Ohio destinations, or that contracts had not been renewed when expired, or that competition of river mines shut them out from the markets to which ex-river rates are applicable."

After pointing out that the ex-river rates and the reduced rates in Ohio became effective almost simultaneously, and were still in effect at the time of the hearing in the *Third Ex-River Case*, Appellants continue:

> "Some of these same witnesses, or other representatives of their districts, testified in the *Ohio* case (R. 1553-55, 1583-84). There, the loss of business was attributed to the Ohio rates, the number of customers lost, the amounts of the losses, the Ohio districts to which the business was lost, together with other pertinent facts, having been given. Here, there were no such evidentiary facts offered. There was no showing how much, if any, of their claimed loss of business was occasioned by the ex-river rates, how much by the reduced Ohio intrastate rates, and how much by the depression."

As we show below there is substantial and sufficient evidence to prove that The Consolidation was unduly prejudiced, and that the ex-river shippers were unduly preferred, by the ex-river rates.

In so far as the statements quoted above are intended to suggest, and apparently they are, that the losses claimed in these proceedings to result from ex-river rates were attributed to the reduced rates in Ohio by witnesses for the same mine operators, they are contrary to the evidence with respect to The Consolidation.

Obviously the fact that "other representatives of their districts", who did not testify here, may have proved business was lost to Ohio districts by reason of the reduced

rates in Ohio, can, in no possible way, discredit proof in this record of business lost to ex-river shippers by operators who did testify in these cases.

The effect of the depression has just been commented on.

Examination of the pages of the record (1553-55) referred to by Appellants shows that they are part of a summary in the Commission's report in the *Ohio Coal Cases* of evidence of certain witnesses in those cases.

The first specific witness mentioned is one for retail dealers, for whom no one testified here. The next is a witness for the Pittsburgh Coal Company, which offered no evidence here as to any loss of business. The next is a witness for a producer in the Kanawha and Kenova-Thacker districts. No witness from those districts testified here as to any loss of traffic. The next and last specific mention of a witness on those pages is of one for a producer on the Monongahela Railway in the Fairmont district. No testimony was given here for that producer.

The evidence summarized on pages 1583-84 is that of a witness for The Consolidation who attributed its losses entirely to use by shippers of the reduced rates in Ohio. They were not ex-river rates.

We have already (p. 20 *supra*) referred to the evidence in this case of loss of business by The Consolidation due to ex-river rates. A reading of what is there said, and of the evidence referred to, clearly shows that the witness was speaking of something different from that discussed by another witness for The Consolidation in the *Ohio Coal Cases*. It will be noted that the witness' testimony in this case is as to business on which there was a prospect of ex-river movement.

Another indication that there is a difference between the estimated loss of business mentioned by the Commission in the report in the *Ohio Coal Cases*, and the business on which The Consolidation "had the opportunity to bid", discussed in this case, is contained in Exhibit F-66 (R. 1468A).

That exhibit is a statement of bids for coal received by the City of Cleveland on May 26, 1933, nearly a month after the decision of the Commission in the *Ohio Coal Cases* and about two months after March 31, 1933, the end of the 8-months' period covered by the estimate in the Commission's report. The exhibit shows that The Consolidation had bid on May 26, 1933, upon 100,000 tons in competition with ex-river shippers.

Mr. Andrews testified that The Consolidation had had opportunity to bid on certain business in competition with ex-river shippers, and that one of the contracts on which it had bid had not, at the time of the hearing, been awarded. The affidavit of Mr. Snider, filed at the hearing in the Court below on March 10, 1934, shows that after the hearing this particular contract was awarded to an ex-river shipper (R. 155). Obviously the losses of The Consolidation referred to by the Commission in its report, dated May 2, 1933, in the *Ohio Coal Cases* could not have included this particular contract, awarded after the hearing in this case in June, 1933.

In addition there is not one word in the record which contradicts or in any way even disputes the testimony of Mr. Andrews. In the cross-examination of Mr. Andrews no effort whatsoever was made to show any error or discrepancy in his testimony, or any inclusion therein of tonnage stated in the Commission's report, although the report of the Commission in the *Ohio Coal Cases* had been made public more than a month before his testimony was given. The testimony therefore stands uncontradicted and undisputed.

The findings of the Commission in the *Ohio Coal Cases* in no way discredit, controvert, or even tend to weaken Mr. Andrews' testimony. We submit that there is substantial evidence to support the Commission's finding of undue preference and prejudice. That is what this Court must decide (*Assigned Car Cases*, 274 U. S. 564, 580). The credibility of

the witness and the weight of the evidence are matters for the Commission, not the courts (*Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382, 392).

Appellants next insist (pp. 139-140) that much of the ex-river coal is captive and therefore is not in competition with coal from inland mines.

It is true that a large part of the movement to Youngstown was of captive coal, but not quite so large a part as might be inferred from Appellants' statement. During the 10½ months from July 16, 1932, when the ex-river rates became effective, to May 31, 1933, the last date for which figures were given in the last hearing before the Commission, 226,435 tons moved ex-river to the Youngstown group (Youngstown, Warren, and Struthers), as shown by Exhibit F-30 (R. 1430-1434). So far as shown by the record before the Commission (Exhibits 47 and 48, R. 1456) 159,192 tons, or about 70 per cent, was captive coal for the Youngstown Sheet & Tube Company. That company, however, buys from other companies for use at Youngstown a considerable amount of coal. In 1932 it purchased from other companies and shipped to Youngstown 247,966 tons of coal, whereas it received from Nemacolin, its captive river mine, only 185,284 tons, some of which in that year moved all-rail (Exhibit F-46, R. 1455). It may be inferred fairly that the coal thus purchased must, to some extent at least, compete with the captive coal.

These figures are for the Youngstown group only. During the same ten and one-half months' period about 600,000 tons moved ex-river to markets other than those in the Youngstown group (Exhibits F-30, F-31, R. 1430-1436). Nothing in the record indicates how much of that other and greater tonnage was captive coal.

But, irrespective of the actual tonnage of ex-river coal which is competitive with coal from the inland mines, the latter are entitled to a reasonable and non-discriminatory

rate adjustment. This has been held repeatedly by the Commission.

For example, in *Natchez Chamber of Commerce* v. *L. & A. Ry. Co.*, 58 I. C. C. 610, at page 618 it is said:

> "An undue prejudice that causes injury to a small volume of traffic is just as unlawful as one which causes injury to a large volume."

See also *Railroad Commission of Louisiana* v. *A. H. T. Ry. Co.*, 48 I. C. C. 312, 364; *Container Service*, 173 I. C. C. 377, 440, and cases cited.

Although we think that the record establishes with sufficient certainty that The Consolidation has lost business because of the ex-river rates, in proving undue preference and prejudice it is not necessary that precise loss be shown in all cases.

In *Southern Kansas Grain Asso.* v. *C., R. I. & P. Ry. Co.*, 139 I. C. C. 641, it is said at page 670:

> "When the question before us is the existence of undue prejudice as a *fact*, as distinguished from any question of the *damage* arising from it, the tendency of a given rate adjustment may be considered."

See also *Pitch and Tar in C. F. A. Territory*, 122 I. C. C. 573, 580; *Washington Nursery Co.* v. *Southern P. Co.*, 148 I. C. C. 608, 611.

In the instant cases when the first two hearings were had no testimony as to losses could possibly have been introduced because the whole thing was prospective. There were no rates. There was no movement. Consequently loss could not have been proved. Certainly under such circumstances evidence tending to show the probable result of the ex-river rates would have been admissible to prove undue preference and prejudice.

Nothing further need be said to demonstrate that there is substantial evidence to sustain the Commission's findings in respect of undue prejudice.

Appellants next urge (p. 140) that the necessary findings were not made by the Commission.

A reading of the Commission's report shows many recitals and findings which support a finding of undue preference and prejudice in addition to those mentioned at pages 140-142 of Appellants' brief. For instance,

> "From an operating standpoint these cars of ex-river coal are handled in substantially the same manner as the coal from mines in Ohio No. 8 district in the same general territory" (R. 39).
>
> "Coal from nearby mines by truck is loaded into the Wheeling's cars at Martins Ferry on the same track and through the facility used in lifting ex-river coal from barges to cars" (R. 39, 40).
>
> "Mines are located at or near points on the Wheeling at which river transfer facilities are located, and these mines are in keen competition with coal transported on the ex-river rates" (R. 40).
>
> "The present record shows clearly that the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines served by tracks similar to those at the river transfer points" (R. 43).

As we have already shown, these and the other findings supporting the finding of undue preference and prejudice are themselves supported by substantial evidence.

Appellants state in the closing paragraph of their brief (p. 142) that certain findings referred to do not, within the purview of the *Milwaukee Case, United States of America, et al.*, v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al.*, decided by this Court March 4, 1935, "spell out with the required preciseness the extent of the losses * * *." By no stretch of the imagination can the language in the *Milwaukee Case* referred to be construed as having been used by the Court to indicate what a shipper must prove to establish undue preference or prejudice.

The chief concern of The Consolidation in the case at bar is, as already stated, the relationship between the all-

rail rates on coal from its mines and the ex-river rates on coal from mines of its competitors to common markets in northeastern Ohio. It has no water mines and can not use the ex-river rates. The intrinsic reasonableness of the ex-river rates therefore gives it no such direct or special concern as to force it to the fore on that issue. The same, indeed, might be said of the question whether they will tend to disrupt the existing rate structure through reduction of all-rail rates. It has not assailed the all-rail rates in the case at bar.

We therefore leave it to counsel for other appellees to make such reply as they deem fitting to Points I and II of Appellants' brief, and merely note in passing a few outstanding errors in Appellants' argument under those points.

IV.

COMMENTS ON POINT I OF APPELLANTS' BRIEF.

One of these errors appears under Point I at page 61 of that brief. There counsel for Appellants say:

> "The logical inference to be drawn from the physical make-up of the report, reinforced by the decision in the *Milwaukee* case, is that in the 'Summary', following the discursive recital of various facts appearing of record and immediately preceding the Commission's ultimate conclusions, are to be found the 'basic or quasi-jurisdictional facts' upon which such conclusions were based."

We submit that this "logical inference" is an unwarranted assumption. The report is there for them to read. Any statements therein of fact, wherever found, are part of the report and may not fail of recognition because of the physical make-up. This Court has consistently held that the Commission is not required to make its findings in any particular form, and that its reports must be read as a

whole. The "basic or quasi-jurisdictional facts" are not necessarily to be found in the "Summary."

It is next stated (p. 61) that "The Summary contains but three findings of fact:" which are then set out.

Many findings of fact are in the Summary besides those three. Thus the very first sentence therein, not included in those three, is a finding, and, as we have endeavored to show in our opening statement, a very important finding. It reads:

> "These cases were first decided at a time when ex-river coal was not being transported, and the character of the service that was to be rendered thereon could not be ascertained" (R. 43).

Again (R. 44):

> "Most of the mines in the Pittsburgh, Connellsville, and Fairmont districts cannot load coal direct to barges and, therefore, as previously indicated, unduly low ex-river rates affect those mines adversely."

Again (R. 45):

> "The evidence indicates that the ex-river rates are too low and for that reason are unreasonable."

The first finding, numbered (1), mentioned by Appellants, dealing with similarity of service, has, we think, been sufficiently discussed in the earlier portions of this brief. We merely call attention to Appellants' statement (p. 54) that "all-rail coal moves over precisely the same route from the river to Youngstown" as the ex-river coal, and, as we have shown, in the same trains. Obviously, from the river on, the service is identical. And (R. 39-40) the Commission finds, elsewhere than in the Summary:

> "Coal from nearby mines by truck is loaded into the Wheeling's cars at Martins Ferry on the same track and through the facility used in lifting ex-river coal from the barges to cars."

Plainly here the service on all-rail and ex-river coal is identical even as to service at the loading point.

The second finding (2) mentioned by Appellants (p. 63) has been sufficiently discussed in our argument with respect to undue preference.

The third finding (3) mentioned by Appellants (p. 64) relates to disruption of the rate adjustment, and the *Milwaukee Case* is relied upon for much of the argument that follows. As we assume that the other appellees will discuss fully the question of disruption, we make few comments upon the *Milwaukee Case*.

As we understand that decision all that the Court really held was that the Commission's conclusions, or findings of ultimate fact, were not properly supported by the proper evidentiary findings. That, we submit, is not the situation here.

Furthermore, the facts in the *Milwaukee Case* were quite different. There the Commission had denied the Milwaukee's thirteenth-section application for restoration of the State rates to their former relation with the interstate rates. This it denied because in its judgment the interstate rates were not upon a proper level. Then, but not until then, the Milwaukee filed reduced rates from Indiana to conform with the new adjustment in effect from Illinois and Kentucky mines. The Commission required it to cancel those rates and the order was enjoined by the court below. The Milwaukee had done all that it could to maintain the recognized rate adjustment, even at the lower level set by State authority.

The situation in the instant case, however, is quite different. In the *Ohio Coal Cases* the Commission had found reasonable the interstate rates, including the rates from Connellsville and Pittsburgh districts to Youngstown and Cleveland, and had required restoration and maintenance of certain State rates in Ohio to remove undue prejudice to interstate shippers and unjust discrimination against inter-

state commerce. In the instant cases it was lining up the only remaining rates, the ex-river rates, so as to conform to the adjustment which it had already fixed or approved. The *Milwaukee Case* therefore does not seem to be any authority for holding void what the Commission has done in this case.

The only other argument in Appellants' Point I to which we wish to direct attention is that commencing at page 86 with respect to the recent decision of the Commission in *Lake Cargo Coal Rates*, 200 I. C. C. 4, decided February 20, 1934 (R. 1604). The Commission there found upon the evidence that certain rates prescribed by it in 1927 in *Lake Cargo Coal Rates (1925)*, 126 I. C. C. 309, were still maximum reasonable rates and declined to change them. In the instant case it found upon the evidence that the ex-river rates were unreasonably low, unduly preferential and unduly prejudicial, and required them to be increased. It is at least conceivable that the Commission was right in both decisions. They do not conflict. The facts as well as the issues differ. But, be that as it may, only one of the decisions is now before this Court and the question presented is whether the action of the Commission in *this* case is supported by substantial evidence and rests upon proper conception of the law. The *Lake Cargo Cases* afford no precedent for holding the Commission's order void.

V.

COMMENTS ON POINT II OF APPELLANTS' BRIEF.

As we have stated before, Appellants completely ignore the fact that the Commission had already found reasonable the interstate all-rail rates for service in part over the very same rails and between the very same points and in the very same trains as this ex-river coal, and had prescribed minimum rates for the all-rail service from Ohio No. 8 district to northeastern Ohio. To Cleveland the all-rail rate

so found as a minimum is $1.74, the ex-river rate from ports within that district is $1.45, and the lake-cargo rate is $1.43.

It seems to us that these rates fixed or approved in the *Ohio Coal Cases* are sufficient to sustain the Commission's measure of the ex-river rates even if no other comparisons were present. In the former *Ex-river Cases* two divisions of the Commission had each applied other measures. In other words, the same measure is now applied to the ex-river and to the all-rail rates, and although the ex-river rates are not on so high a level as the all-rail rates, we believe that the Commission had sufficient evidence before it and has made the findings proper to support those rates.

VI.

CONCLUSION.

The Commission has not exceeded the authority conferred upon it by law, and has made the requisite findings to support its ultimate conclusion. Such findings and conclusion and the order are supported by substantial evidence.

This Court should therefore affirm the decree of the lower court dismissing the bill.

Respectfully submitted,

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716 Jackson Place, N. W.,
Washington, D. C.,
April 24, 1935.

Appendix A.

"Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (24 Stat. 380; 41 Stat. 479; U. S. C. Title 49 § 3(1).)

"Sec. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or wthout any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commis-

sion finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (41 Stat. 484; U. S. C. Title 49 § 15.)